

Commissioner of Political Practices, JENNIFER L. HENSLEY
Testimony on HB 556
February 17, 2011
House State Administration Committee

Madam Chair, Members of the Committee:

I appear today to respectfully oppose House Bill 556. I have spoken with Rep. Osmundson about this bill, and appreciate that he approaches this piece of legislation with the intent of reducing the number of complaints filed with my office, but in my capacity as Commissioner, I believe the approach to this issue is fundamentally flawed.

The administrative remedy is available to citizens of Montana for some very good reasons – one of which is that individuals who are the decision-makers on the administrative level are experienced and well-advised in the areas of policy they are deciding.

The reasons for this level of review are similar to the reasons for administrative rule-making - the Legislature, being a part-time body and lacking expertise in the many varied purposes of state government, often does not have the time, background, and resources to adopt as statutory law the many detailed provisions needed to implement the statutes that the Legislature enacts, so you authorize those who work within these policies on a day to day basis to create rules that most appropriately address and carry out your intent.

The administrative review available currently through the complaint process in my office is necessary to administer the legislation that you authorize with expertise, precision, and fairness. In a perfect world, I would add the word "speed" to that list, but I will address expedited proceedings later in my testimony.

This bill would **require** individuals to skip an administrative remedy currently available to them and file lawsuits in District Court. Currently, if a citizen feels strongly enough about an injustice they have the right to file a

civil complaint at the Clerk of Court's office where jurisdiction lies. That individual pays a filing fee of \$120, is assigned to a judge, and then is responsible for the service of the complaint upon the defendant. This process can be extensive and expensive, and is often accomplished through the publication of the Defendant's name in a newspaper (at the expense of the Plaintiff.) And then the real fun begins. Deeper and deeper into Civil Court Procedure everyone goes, sometimes for years, at great expense to all involved.

A Plaintiff is motivated to enter this system in order to right a wrong that has been perpetrated upon them, to request that the judicial system formally judge that the Defendant has, in fact, broken the law, that the Plaintiff has suffered as a result, and that the Plaintiff is deserving of financial compensation as a result.

House Bill 556 would require an individual who believes that a candidate or a committee has violated the laws that you as a body have authorized to enter that expensive, complicated, and frustrating system immediately, if the four-member board determines that a set of criteria have been met.

That is the philosophical summary of the bill.

On its face, we may want to agree with some of the arguments. "If they want to use complaints to make a political point, let them spend their own money to do it". I completely empathize with this argument, but in practice, we immediately are faced with the grim reality of what kinds of complaints are actually being filed.

To illustrate my point, let me give you an example of what would happen if another kind of cop were purposely hopscotched. I live on a street that is an easy connector of two major traffic arteries. While this street is residential, with many families and small children running around, it's easy to take a shortcut in front of my house to get from Harrison Avenue to Farragut Avenue. As a result, we see many speeding vehicles in front of the house.

Many of my neighbors, as concerned parents, have asked that local law enforcement put extra patrols on the street in hopes that will dissuade regular

speeding shortcutters. It works for a few weeks, but then we're left to yell at passing vehicles from the safety of our fences.

If we were to have a similar requirement in the world of speeding cars as is proposed for the world of campaign finance, I would, as a private citizen, be obligated to investigate, track down and serve a complaint upon that darn blue Chevy Blazer that keeps speeding past every day at 5:15 p.m. It would be my responsibility to prove to a judge that the cell-phone chattering driver is breaking the law. It would be my responsibility, once the judge agreed with me, to collect the fine levied against the driver. Once collected, that fine would not go to me, but into the city coffers. I would not receive recompense for my time, my attorney's fees, or court costs I had to pay to initiate the action.

This of course is an absurd metaphor, and while I realize the relation is limited, it's not entirely dissimilar to what Rep. Osmundson is asking you to do to the citizens of Montana.

Campaigns will break the law, purposefully or negligently. Committees will fail to report expenditures, and will refuse to let the citizens of Montana know where they got those tens of thousands of dollars to sway the elections. More than one individual is affected when those laws are trampled upon. More than one committee is harmed when a phantom committee who refuses to disclose their donors or expenditures blankets our state in propaganda. The responsibility for enforcement of our campaign finance laws correctly lies with my office, and I take it quite seriously.

To address the proposed board specifically, as written, according to counsel for my office who has been practicing in this field for over twenty years, the appointment process for the new board is unconstitutional, specifically violating the separation of powers doctrine. That process, if this bill is passed and signed into law, will be tested in court.

A four member board comprised of political partisans guarantees gridlock. Every major vote involving a contentious partisan complaint may result in a 2-2 tie. The current FEC is a classic example of how an equally divided partisan Commission cannot make a decision to pursue the most blatant federal campaign law violations. Every vote involving the most partisan issues fails on a 3-3 tie vote. Here in Montana, our partisan vigilance is nowhere near that seen in Washington DC, but the construct of the board as written will absolutely lead to impasse.

Under subsection (7) on page 2, the Commissioner would be required to

“refer...any apparent violation of law in which it appears to the commissioner that the violation may not be resolved by the issuance of a single notice of violation or a single order by the commissioner and may require resolution by the commissioner by the use of more than one administrative order or pursuant to the contested case procedure under the Montana Administrative Procedure Act.”

In simple terms, if it looks like a big thing, I pass it on to the board to see if I can proceed with enforcement or if we are going to make the complainant go to District Court.

Problem is, we don't know if the thing is big unless we take a good, long look at it. I realize that this may seem like a simple determination, but I assure you it is not.

1. “...any apparent violation of law...” I receive complaints stating that a committee has not fully disclosed all of their donors, as the complainant has reviewed their reports and knows that four separate fundraising dinners were nowhere on the committee report. On its face, if I were to believe all complainants, that could be construed as an apparent violation of the law. But what if this complainant is simply incorrect? With no investigation or questions, I would have no basis to make the determination.

2. "...violation may not be resolved by the issuance of a single notice of violation..." I don't know what a single notice of violation is. Is it a subpoena requesting all records of donations received? Is it an initial letter telling a shadow committee that they have to file paperwork with our office? Is it an order of noncompliance for late filing of a report, as ordered by §13-37-121, MCA? Is it a formal Finding of Fact and Conclusion of Law as required by law?
3. "...may require resolution by the commissioner by the use of more than one administrative order..." this raises the same questions – is my decision an administrative order? Is a subpoena that I issue? Is it a letter notifying a party of an administrative penalty for incomplete filing?
4. As written, each and every ethics complaint would go to the board, and again, as many ethics complaints are exceedingly sensitive, gridlock within the board would be guaranteed. As statute requires for ethics complaints to be confidential – to reduce the possibility of smearing the name of the respondent – would the same confidentiality have to apply to District Court proceedings? I submit that the possibility of public ethics hearings would open the floodgates to complaints against any individual who aspires to public office with any degree of visibility.

Proposed board

This proposed board would slow down, rather than speed up, the complaint process. The complex nature of campaign finance and practice would require the presence of an attorney at each and every meeting and discussion to give historical perspective as well as to answer questions of precedence and basic statutory interpretation.

There is no requirement for members of the board to have any experience in the application of campaign finance and practice statutes, ethical requirements, or lobbying laws.

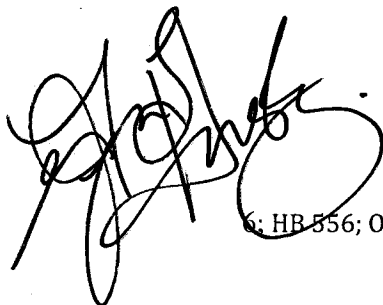
At any given time, members of the committee would have to recuse themselves from considering complaints from or against individuals or committees with which they have had previous dealings, such as campaign

donations, attendance at a fundraising event, mailing list subscriptions, or any other contact that would raise the appearance of conflict of interest.

Personal experience with all-volunteer boards is that members grow weary very quickly of meeting more than quarterly, while the number of complaints and the prescribed 5 day response time would require that the board meet weekly from April to December of election years. I would question the qualifications and/or the motivation of an individual who would volunteer for such a labor-intensive project. In addition, my experience with governing and deciding by committee is that speed is often the first sacrifice to the process, with efficiency a close second.

Many complaints that come into my office deal directly with 1st Amendment rights. Whether it's an individual voicing an opinion with which the opponent disagrees, an entity's ability to raise and spend money elevating their opinion, or the obligation of that entity to disclose where they got that money and how they spent it swaying opinion of voters, the Freedom of Speech will enter into a discussion of any of these issues. Therefore, the Commissioner of Political Practices must make decisions deliberately and with consideration of the considerable precedent that exists from prior rulings both within and outside of the office. To be held accountable to the judicial system and ultimately to the people of Montana, the Commissioner alone must bear the responsibility for a decision. The Commissioner is the one person who has undergone the complete, multi-tiered and multi-branch confirmation process by both statewide and local elected officials sworn to uphold the Laws and the Constitution of the State of Montana.

I realize that Rep. Osmundson is bringing this bill both in service to members of his caucus, and in service to members of the public who are sometimes the target of potentially illegal campaign practices. In his position, responding to both is understandable, and I look forward to continuing our conversation about how to best serve the people of this great state.

A handwritten signature in black ink, appearing to be "Gregory S. Sisk", is written over the bottom of the page. The signature is fluid and cursive, with a large loop at the end.